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No. ____

In The

Supreme Court of the United States

MARK S. FRIDLEY AND DENISE R. FRIDLEY,

Petitioners,

v.

WALTER HORRIGS, INVESTIGATOR, SPECIAL SERVICE INVESTIGATION, OFFICE OF SECRETARY OF STATE DEPARTMENT OF POLICE DISTRICT THREE; DUANE HILL, SGT., ILLINOIS STATE POLICE DISTRICT NINE HEADQUARTERS; FRED BROWN, INVESTIGATOR OFFICE OF SECRETARY OF STATE, DEPARTMENT OF POLICE DISTRICT THREE; DAVE POESCHEL, SGT., OFFICE SECRETARY OF STATE, DEPARTMENT OF POLICE; FRANK WALLACE, INSPECTOR, OFFICE OF SECRETARY OF STATE, DEPARTMENT OF POLICE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do police officers have probable cause to arrest an individual without a warrant when they know or reasonably should know that the arrestee is not guilty?

2. In order to successfully sustain a claim for false arrest under 42 U.S.C. § 1983 must the plaintiff demonstrate what an objectively reasonable/prudent police officer knew or should have known or must Plaintiff demonstrate what the defendant officer(s) conclusively did/did not know?

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PETITION FOR WRIT OF CERTIORARI

Mark S. Fridley and Denise R. Fridley respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 3, 2002.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix 1 to 14 and is reported at 291 F. 3d 867.

The opinion of the United States District Court appears at Appendix 17 to 40 and is reported at 162 F. Supp. 2d 772.

The opinion of the United States Magistrate Judge appears at Appendix 41 to 61 and is unpublished.

JURISDICTION

The Court of Appeals for the Sixth Circuit issued its opinion and judgment on June 3, 2002. A timely petition for rehearing/rehearing *en banc* was filed. The Court of Appeals denied the petition by order dated August 30, 2002. A copy of the order denying rehearing appears at Appendix 62 and 63. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The constitutional provisions applicable to this petition are:

Amendment IV: Search and Seizure:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V: Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Just Compensation for Property:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

> nor shall private property be taken for public use, without just compensation.

Amendment XIV: Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

The relevant portions of the statutes involved in this case are as follows:

42 U.S.C. § 1983: Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . .

18 U.S.C. § 511: Altering or removing motor vehicle identification numbers:

(a) A person who –

(1) knowingly removes, obliterates, tampers with, or alters an identification number for a motor vehicle or motor vehicle part; or

(2) with intent to further the theft of a motor vehicle, knowingly removes, obliterates, tampers with, or alters a decal or device affixed to a motor vehicle pursuant to the Motor Vehicle Theft Prevention Act, shall be fined under this title, imprisoned not more than 5 years, or both.

(b)(1) Subsection (a) of this section does not apply to a removal, obliteration, tampering, or alteration by a person specified in paragraph (2) of this subsection (unless such person knows that the vehicle or part involved is stolen). . . .

Illinois Revised Statutes 5/7-12: Entrapment:

A person is not guilty of an offense if his or her conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of that person. However, this Section is inapplicable if the person was pre-disposed to commit the offense and the public officer or employee, or agent of either, merely affords to that person the opportunity or facility for committing an offense.

Illinois Revised Statutes 5/4-103: Offenses relating to motor vehicles and other vehicles – Felonies:

(a) It is a violation of this Chapter for: . . .

(5) A person to knowingly possess, buy, sell, exchange, give away, or offer to buy, sell, exchange or give away, any manufacturer's identification number plate, mylar sticker, federal certificate label, State police reassignment plate, Secretary of State assigned plate, rosette rivet, or facsimile of such which has not yet been attached to or has been removed from the original or assigned vehicle. It is an affirmative defense to subsection (a) of this Section that the person possessing, buying, selling or exchanging a plate mylar sticker or label described in this paragraph is a police officer doing so as part of his official duties, or is a manufacturer's authorized representative who is replacing any manufacturer's identification number plate, mylar sticker or Federal certificate label originally placed on the vehicle by the manufacturer of the vehicle or any essential part thereof;

Ohio Revised Code § 4549.62: Fraudulent Actions Concerning Vehicle Identification Number:

* * *

(D)(1) No person shall buy, offer to buy, sell, offer to sell, receive, dispose of, conceal, or, except as provided in division (D)(4) of this section, possess any vehicle or vehicle part with knowledge that the vehicle identification number or a derivative thereof has been removed, defaced, covered, altered, or destroyed in such a manner that the identity of the vehicle or part cannot be determined by a visual examination of the number at the site where the manufacturer placed the number. . . .

(4)(a) Divisions (D)(1) and (2) of this section do not apply to the possession of an owner, or the

owner's insurer, who provides satisfactory evidence of all of the following:

(i) That the vehicle identification number or derivative thereof on the vehicle or part has been removed, defaced, covered, altered, or destroyed, after the owner acquired such possession, by another person without the consent of the owner, by accident or other casualty not due to the owner's purpose to conceal or destroy the identity of the vehicle or vehicle part, or by ordinary wear and tear;

(ii) That the person is the owner of the vehicle as shown on a valid certificate of title issued by this state or certificate of title or other lawful evidence of title issued in another state, in a clear chain of title beginning with the manufacturer;

(iii) That the original identity of the vehicle can be established in a manner that excludes any reasonable probability that the vehicle has been stolen from another person. . . .

STATEMENT OF THE CASE

The Sixth U.S. Circuit Court of Appeals upheld a grant of summary judgment in Petitioners' case brought pursuant to 42 U.S.C. § 1983 in favor of law enforcement officers for the State of Illinois who lured Petitioner Mark S. Fridley to bring vintage/antique auto parts and their authenticating VIN tags and certificates of title or bills of sale to the State of Illinois from his home in Shelby County, Ohio, by promising him $5,000 and wiring Mr. Fridley a $500 money order so that they could arrest him. (C. A. App. 703)

The District Court found "There is no evidence the Defendants [the Illinois officers] had any knowledge concerning the Plaintiff's predisposition prior to arresting him." (App. 33, FN 12)

The Illinois Anti-Entrapment Statute law provides:

> A person is **not guilty** of an offense if his or her conduct is incited or induced by a public officer or employee or agent of either for the purpose of obtaining evidence for the prosecution of that person. **However**, this Section is inapplicable if the person was predisposed to commit the offense and the public officer or employee or agent of either, merely affords the person an opportunity or facility for the committing of an offense. *720 IlCS § 5/7-12.* (Bold typeface added)

Where there is evidence of entrapment, Illinois requires that the state prove, beyond a reasonable doubt, that the Defendant was predisposed to commit the crime. *People v. Potthast*, 219 Ill.App.3d 714 (1991), *People v. Martin*, 219 Ill.App.3d 1064 (1991), *People v. Latona*, 268 Ill.App.3d 718 (1994), *People v. Karraker*, 261 Ill.App.3d 942 (1994), *People v. Placek*, 184 Ill.2d 370 (1998).

The Illinois officers were all aware of the above statute as well as the common law prohibitions against entrapment. (C. A. App. 602-603, 640, 506A-506B, 582, 691, 714)

The Illinois officers were likewise aware of procedures to determine if a person was predisposed to commit a crime, but they utilized none of these procedures to determine if Mark S. Fridley was predisposed to deal in contraband auto parts. (C. A. App. 603, 605, 640-642, 506-510, 537, 564, 714-716)

At the time they targeted Petitioner, Mark S. Fridley, for a "buy-bust" operation the lead investigator, Walter Horrigs, heard from an informant/known car thief (C. A. App. 506). Defendant Donald J. Gluszek, that Gluszek had seen an ad in *Hemmings Auto Trader*, and contacted Petitioner Mark S. Fridley who, ". . . had Corvette VIN tags, engines and transmissions with all the matching numbers for sale." (C. A. App. 480B) The information received by Horrigs did not indicate that the VIN tags had been removed from the corresponding parts or that Petitioner was willing to bring the parts and corresponding VIN tags to Illinois.

The officers who worked with Gluszek did nothing to determine if the information which Gluszek had provided was reasonably trustworthy. (C. A. App. 627, 506, 544, 555-557, 583) They "blindly" relied upon what their informant told them. (App. 13)

Appellees nonetheless appropriated $5,000 to induce the Petitioner Mark S. Fridley to bring auto parts to Illinois (C. A. App. 480C-481) wiring $500 expense/good faith money to Petitioner in Ohio the trip with the parts to Illinois. (C. A. App. 483) When Investigator Horrigs wired the $500 to Petitioner in Ohio, Appellee Horrigs had no belief that Petitioner, Mark S. Fridley, was doing anything illegal in Ohio. (C. A. App. 509-510)

The Circuit Court determined:

> ". . . [I]t is clear that the concept of committing the offense originated with the state or its agent, and that the state actively encouraged the defendant to commit the offense for the purpose of obtaining evidence for the defendant's prosecution. The action of these officials is, to put it mildly, most unattractive. (App. 12)

Notwithstanding actual knowledge that Appellees had induced Petitioner, Mark S. Fridley to come to Illinois by paying him $500 against a total inducement of $5,000.00, Appellees arrested Petitioner Mark S. Fridley without a warrant by the Appellees on September 2, 1997 in the parking lot of the Clear Lake K-Mart in Sangamon County, Illinois when he brought vintage Corvette parts with the corresponding certificates of title and VIN tags to sell to Defendant Gluszek for the remainder of the $5,000. (C. A. App. 497-499)

VIN tags alone were never sold or offered for sale. The VIN tags, some of which were detached from the corresponding parts, *all* matched the vehicle titles and parts which were brought to Illinois by Petitioner Mark S. Fridley. (C. A. App. 637, 712)

Petitioner, Mark S. Fridley was jailed and ultimately charged with three counts of violating 5/4-103(a)(5) 625 IlCS in that he, "knowingly offered to sell a manufacturer's identification plate which had been removed from the vehicle to which it had been originally attached." (C. A. App. 202-204).

The expert opinion of Mr. Michael D'Amico, a retired police chief of 30+ years professional law enforcement experience, based upon facts recited in ¶ 6 of his uncontroverted affidavit stated:

> None of the Defendants could cite any fact which would have indicated that Plaintiff, Mark S. Fridley were (sic) predisposed to bring parts, VIN tags, and documents to the State of Illinois if he had not bee(n) wired the $500 to lure him with the parts VIN places and documents to the State of Illinois. (C. A. App. 231)

> ". . . the law enforcement officers involved in this situation either knew or, with the exercise of the most elementary procedures common to all reasonably well trained law enforcement officers attempting to gather evidence against persons dealing in contraband, should have known that the Plaintiff, Mark S. Fridley was being incited or induced by the Defendants for the purpose of obtaining evidence of the prosecution of him, thus rendering him not guilty or was being entrapped as a matter of law." (C. A. App. 234)

The State of Illinois was given leave to proceed by information at a preliminary hearing in Sangamon County, Illinois where the reviewing judge declined to rule on an entrapment defense asserted by the Petitioner Mark S. Fridley. (C. A. App. 210)

Petitioner Mark S. Fridley thereafter filed a motion to dismiss the charges in Illinois on the basis of entrapment (C. A. App. 433-444), prompting the state to dismiss the charges. (C. A. App. 215)

The Illinois Court ultimately granted a motion to Return Evidence (C. A. App. 216-219), which ordered all parts and VIN tags returned to Mr. Fridley.

The Sixth Circuit Court of Appeals characterized the well-established "knew or should have known" standard as, "*Fridley's* 'knew or should have known' standard," (App. 13) and reached the following conclusions:

> (B) . . . if a reasonable officer would not "conclusively know" that the suspect is protected by the defense, then he is free to arrest the suspect provided there is probable cause to do so. . . . (App. 10)

(C) "Fridley must provide facts such that a reasonable jury could conclude that: . . . the police knew Fridley lacked predisposition to commit the crime for which he was arrested. *See People v. Rivas,* 707 N.E.2d 159, 169 (Ill.Ct.App.1998)." . . . While the officers may have known that Fridley was induced, they had no knowledge that he lacked predisposition. Failing to sustain this burden, Fridley cannot succeed on his § 1983 action (App. 11)

(D) While reasonably well-trained officers should have been on notice that the actions of these defendants, and their agent Gluzsek, were likely to raise entrapment as a defense to any subsequent prosecution, probable cause is found when a reasonable officer could find that a crime is being committed. Had the defendants not blindly relied on their informant, they may have called off the investigation after determining that the possibility of a successful prosecution was slim. Nevertheless, because Fridley fails to provide any facts demonstrating that these defendants conclusively knew he lacked predisposition, his § 1983 claim fails. Fridley's "knew, or should have known" standard risks turning affirmative defenses into causes of action. (App. 13)

REASONS THE WRIT SHOULD BE GRANTED

1. Granting the writ will insure the perpetuation of the historical "belief of guilt" criteria for determining probable cause justifying an arrest without a warrant.

> 'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' *McCarthy v. De Armit*, 99 Pa. 63, 69, quoted with approval in the *Carroll* opinion. 267 U.S. at page 161, 45 S.Ct. at page 288, 69 L.Ed. 543, 39 A.L.R. 790. *Brinegar v. United States*, 338 U.S. 160, 175 (1949)

Probable cause simply cannot exist absent a belief of guilt.

Notwithstanding this time-honored criteria, the Sixth Circuit has determined:

> . . . if a reasonable officer would not "conclusively know" that the suspect is protected by the (entrapment) defense, then he is free to arrest the suspect provided there is probable cause to do so. . . . (Petition App. 10) "Fridley must provide facts such that a reasonable jury could conclude that: . . . the police knew that Fridley lacked predisposition to commit the crime for which he was arrested. *See People v. Rivas,* 707 N.E.2d 159, 169 (Ill.Ct.App.1998)." (Petition App. 11)

Random, capricious, and arbitrary arrests are thus licensed by the Sixth Circuit requirement that arrestees challenging the lawfulness of warrantless arrests be able to prove that arresting officers "conclusively know" that a prospective arrestee is not guilty or is protected by an

affirmative defense in order to have an arrest declared unconstitutional.

In the case at bar the Circuit Court determined:

> ". . . [I]t is clear that the concept of committing the offense originated with the state or its agent, and that the state actively encouraged the defendant to commit the offense for the purpose of obtaining evidence for the defendant's prosecution. The action of these officials is, to put it mildly, most unattractive. (App.12)

As all of the arresting officers in this case were acquainted with the Illinois Anti-Entrapment Statute:

> A person is **not guilty** of an offense if his or her conduct is incited or induced by a public officer or employee or agent of either for the purpose of obtaining evidence for the prosecution of that person. However, this Section is inapplicable if the person was predisposed to commit the offense and the public officer or employee or agent of either, merely affords the person an opportunity or facility for the committing of an offense. *720 IlCS § 5/7-12.* (bold typeface added)

They were thus aware that Petitioner, Mark S. Fridley was NOT GUILTY *UNLESS* they could prove that he was predisposed[1] beyond a reasonable doubt. *People v. Potthast*, 219 Ill.App.3d 714 (1991), *People v. Martin*, 219 Ill.App.3d 1064 (1991), *People v. Latona*, 268 Ill.App.3d

[1] Predisposition provides an exception to the "not guilty" status of the person who is incited or induced to commit a crime.

718 (1994), *People v. Karraker*, 261 Ill.App.3d 942 (1994), *People v. Placek*, 184 Ill.2d 370 (1998).

In order to harbor any ethical belief that Petitioner was guilty, the officers needed SOME evidence (And this 'means less than evidence which would justify condemnation' or conviction, as Marshall, C.J., said for the Court more than a century ago in *Locke v. United States*, 7 Cranch 339, 348, 3 L.Ed. 364. *Brinegar*, *supra*, at page 175) that Petitioner was predisposed.

The District Court found, "There is no evidence that the Defendants had any knowledge concerning the Plaintiff's predisposition, prior to arresting him." (App. 33, FN 12) They therefore could not have harbored ANY reasonable ground for belief of guilt and arrested him without probable cause.

The consequence of denying the writ will result in an atmosphere where arrests are constitutionally validated unless the arrestees can prove that the arresting officers had personal, conclusive knowledge of the innocence of the arrestee. Officers will thus be free to randomly arrest persons unless the arrestee can prove that the officer "conclusively knew" that he had the wrong man, or that the officer "conclusively knew" that the arrestee had a solid alibi. Eliminating the requirement that probable cause be based upon a reasonable ground for belief of guilt emasculates the entire notion of probable cause, licensing arrests for mere possible cause at the whim and caprice of the police.

2. Granting the writ will insure the perpetuation of the objective, "prudent man" or "reasonable officer" criteria for making probable cause determination.

The Sixth Circuit requirement that probable cause (or lack thereof) determinations for arrests without a warrant depend upon proof of what arresting officers "conclusively knew" emasculates the "prudent man" (*Beck v. Ohio*, 397 U.S. 89 (1964)) test.

Probable cause for an arrest has historically been determined by the test:

> ". . . [W]hether at that moment the facts and circumstances within their (the arresting officers) knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. *Brinegar v. United States*, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 1310-1311, 93 L.Ed. 1879; *Henry v. United States*, 361 U.S. 98, 102, 80 S.Ct. 168, 171, 4 L.Ed.2d 134. *Id.* at 91. (parenthesis added)

The "prudent man" is not necessarily the actual individual officer(s) who makes the arrest. He or she is the "objectively reasonable police officer."

> The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. *Ornelas v. United States*, 517 U.S. 690, 696 (1996).

The determination of whether or not a police officer was objectively reasonable does not question what a particular officer "conclusively knew," but what that officer "knew or should have known." As applied to probable cause determinations *(Mally v. Briggs*, 475 U.S. 335, 349 (1986)) the question of what is objectively reasonable involves what someone, "knew or reasonably should have known," *Harlow v. Fitzgerald,* 457 U.S. 800, 815 (1982).

Contrary to the Circuit Court's labeling of the "knew or should have known" concept for determining objective reasonableness as, "*Fridley's* "knew, or should have known standard,"" (App. 13) the "knew or should have known" yardstick has been accepted as so obvious and fundamental to probable cause determinations that it passes without notice or comment.

White, J., characterized, ". . . [A]n arrest which the arresting officers knew or should have known was without probable cause . . . " as unconstitutional. *Brown v. Illinois*, 422 U.S. 590, 606 (1975) White, J., concurring.

Thus, the concept of objective reasonableness when determining probable cause for arrest without a warrant based upon what police officers knew or should have known is neither novel nor an invention of petitioner.

The justification of the Circuit Court for refusing to apply the concept of objective reasonableness to probable cause for arrest determinations is:

> Nevertheless, because Fridley fails to provide any facts demonstrating that these defendants conclusively knew he lacked predisposition, his § 1983 claim fails. Fridley's "knew, or should have known" standard risks turning affirmative defenses into causes of action. (Apx. Page 13)

The justification of the Circuit Court runs contrary to the traditional holdings where acts of public officials are judged on the basis of what they are *expected* to have known.

> Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. (Footnote omitted) *Harlow v. Fitzgerald, supra*, at 419.

Police officers should, like all other public servants, be required to respond when they can be expected to know. Police are not entitled to an exemption from liability because an injured claimant cannot prove what they did not conclusively know.

If the officers in this case did not conclusively know that the Petitioner was "not guilty," the evidence is uncontroverted that prudent officers reasonably would or should have known this fact. (C. A. App. 234)

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2002 FED App. 0195P
(6th Cir.)

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARK S. FRIDLEY; DENISE R. FRIDLEY,
Plaintiffs-Appellants,

v.

WALTER HORRIGHS, Investigator, Special Service Investigation Office of Secretary of State Department of Police District Three; DUANE HILL, Sgt., Illinois State Police District Nine Headquarters; FRED BROWN, Investigator, Office of Secretary of State, Department of Police District Three; DAVE POESCHEL, Sgt., Office Secretary of State, Department of Police; FRANK WALLACE, Inspector, Office of Secretary of State Department of Police,
Defendants-Appellees.

No. 00-4148

Appeal from the United States District Court
for the Southern District of Ohio at Dayton.
No. 99-00008 – Walter H Rice, Chief District Judge.

Argued: January 29, 2002

Decided and Filed: June 3, 2002

Before: RYAN and GILMAN, Circuit Judges; POLSTER, District Judge.*

COUNSEL

ARGUED: Konrad Kuczak, Dayton, Ohio, for Appellants. Mary E. Welsh, STATE ATTORNEY GENERAL OFFICE, Chicago, Illinois, for Appellees. **ON BRIEF:** Konrad Kuczak, Dayton, Ohio, for Appellants, Darryl B. Simko, STATE ATTORNEY GENERAL OFFICE, Chicago, Illinois, for Appellees.

OPINION

RYAN, Circuit Judge.

Mark S. Fridley appeals the district court's grant of summary judgment, dismissing his 42 U.S.C. § 1983 action. Fridley brought suit against officers of the Illinois State Police and the Illinois Secretary of State Department of Police in their individual capacities. His wife, Denise R. Fridley, sued the officers for loss of consortium. Fridley alleges that when the officers placed him under arrest for unlawfully selling vehicle identification number (VIN) tags that had been removed from motor vehicle parts, they lacked probable cause because they should have known that he was protected from criminal liability by an affirmative defense.

* The Honorable Dan A. Polster, United States District Judge for the Northern District of Ohio, sitting by designation.

In granting the defendants' summary judgment motion, the district court held that at the time of Fridley's arrest, the defendants had no knowledge of any facts establishing an affirmative defense to the offense for which Fridley was arrested. For the reasons set forth below, we will affirm the judgment of the district court.

I.

Fridley, a resident of Ohio and a collector of vintage Corvette automobiles, placed an advertisement in a national automotive publication offering to sell two of his Corvettes. After seeing the advertisement, Donald Gluzsek, an informant for the Illinois Secretary of State Department of Police, contacted Fridley and learned that he also had Corvette parts for sale. Gluzsek learned that several of Fridley's Corvette parts had detached VIN tags. Fridley claims that one of the VIN tags had fallen off naturally, while others were detached when he obtained them or he detached them himself. Gluzsek made more than 10 telephone calls and a $500 cash advance to Fridley in an effort to arrange a purchase of the parts and their accompanying VIN tags. Although Fridley was originally reticent to assume the expense and trouble of traveling to Illinois to complete the sale, after repeated negotiations over the phone and Gluzsek's agreement to pay $1,000 for Fridley's expenses, with $500 in advance, the two arranged to meet in a parking lot in Springfield, Illinois, to complete the transaction.

On the morning of the sale, Gluzsek was accompanied by Walter Horrighs and Fred Brown, undercover officers with the Illinois Secretary of State Department of Police and defendants in the present action. Horrighs was the

officer with primary responsibility for dealing with Gluzsek, and the remaining defendants – Duane Hill, Dave Poeschel, and Frank Wallace – either supervised Horrighs or played some supervisory role in the investigation. At the sale, Fridley offered three Corvette parts from which VIN tags had been detached. For each part, Fridley had the VIN tags in a separate envelope, as well as valid certificates of title. There is no dispute that Fridley was the lawful owner of the parts.

Upon conclusion of the sale, the police placed Fridley under arrest for violation of 625 Ill. Comp. Stat. 5/4-103(a)(5), which criminalizes the possession and sale of VIN tags that have been removed from a vehicle.

Prior to Fridley's arrest, none of the police officers had monitored or supervised any part of Gluzsek's conversations with Fridley. Neither Horrighs nor his superiors had attempted to verify any of the information Gluzsek provided, nor had they investigated Gluzsek's prior history. No effort had been made to gather information regarding Fridley, including his predisposition to commit the act for which he was arrested. Gluzsek, who had earlier been arrested for his role in an automobile theft ring and was hoping that his effort to gather information about stolen Corvette parts would earn him leniency from the authorities, had contacted Fridley unbidden by the police.

At Fridley's preliminary hearing following the arrest, an Illinois court held that there was probable cause to find that Fridley violated section 4-103(a)(5). Subsequently, however, the prosecutor moved to dismiss the charges, and they were dismissed. Fridley's property, other than the VIN tags, was released to him some time later. Almost a year following his arrest, the VIN tags were returned to

Fridley, but only upon court order. Fridley later filed this lawsuit.

Fridley's original action, heard by a magistrate judge, alleged a variety of constitutional violations, including a deprivation of Fourth, Fifth, Sixth, and Fourteenth Amendment rights. Fridley also pled a number of Illinois common law violations, which claims were ultimately dismissed.

The magistrate judge first reviewed Fridley's § 1983 claims concerning probable cause and recommended that the district court grant the defendants' motion for summary judgment. The magistrate judge relied on Seventh Circuit authority, about which more below, reasoning that its holdings on probable cause control because the arrest occurred in Illinois. The magistrate judge concluded that once a police officer determines that facts providing probable cause exist, the officer has no further duty to investigate exculpatory evidence. Moreover, he found that under Sixth Circuit authority, the result would be the same because the police did not "know" that they had entrapped Fridley. The district court accepted the magistrate judge's recommendation, except the conclusion that Seventh Circuit authority was binding. Applying Sixth Circuit law, the district court held that upon Fridley's arrest, the defendants did not have knowledge of exculpatory facts, and thus had probable cause to make the arrest.

II.

A.

Fridley has restricted his argument to the claim that his arrest violated his Fourth Amendment right to be free

from warrantless arrest absent probable cause. On appeal, he claims that when the police arrested him they knew, or should have known, that they entrapped him; that the affirmative defense precluded his prosecution; and that, as a result, he was arrested without probable cause. He further argues that the district court's conclusion that the police need not have investigated his prearrest predisposition to commit the offense for which he was arrested is erroneous, because under the summary judgment standard it is sufficient to demonstrate what a reasonably well-trained officer would have known. Fridley contends that the affidavit of his expert, which the district court rejected as conclusory, demonstrates that a reasonably well-trained police officer should have inquired into Fridley's predisposition in light of the obvious incitement and inducement. As we will explain, however, Fridley's argument misstates the law of probable cause.

We review *de novo* a district court's decision to grant summary judgment. *Miller v. Am. Heavy Lift Shipping*, 231 F.3d 242, 246 (6th Cir. 2000). A grant of summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute over a material fact cannot be genuine unless "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In reviewing the district court's decision to grant summary judgment, we view all facts and the inferences drawn therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983 (West Supp. 2001). A plaintiff's claim brought under § 1983 requires proof that: (1) the defendant was a person acting under the color of state law, and (2) the defendant deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 814 (6th Cir. 1996).

In order for a wrongful arrest claim to succeed under § 1983, a plaintiff must prove that the police lacked probable cause. *Painter v. Robertson,* 185 F.3d 557, 569 (6th Cir. 1999). A police officer has probable cause if there is a "'fair probability'" that the individual to be arrested has either committed or intends to commit a crime. *Northrop v. Trippett,* 265 F.3d 372, 379 (6th Cir. 2001) (quoting *United States v. Sokolow,* 490 U.S. 1, 7 (1989)), *cert. denied,* 2002 WL 171976, 70 U.S.L.W. 3482 (2002). A police officer determines the existence of probable cause by examining the facts and circumstances within his knowledge that are sufficient to inform "a prudent person, or one of reasonable caution," that the suspect "has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo,* 443 U.S. 31, 37 (1979). "In general, the existence of probable cause in a § 1983 action presents a jury

question, unless there is only one reasonable determination possible." *Pyles v. Raisor,* 60 F.3d 1211, 1215 (6th Cir. 1995).

It is a felony in Illinois for:

> A person to knowingly possess, buy, sell, exchange, give away, or offer to buy, sell, exchange or give away, any manufacturer's identification number plate . . . which has not yet been attached to or has been removed from the original or assigned vehicle.

625 Ill. Comp. Stat. 5/4-103(a)(5). However:

> A person is not guilty of an offense if his or her conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of that person. However, this Section is inapplicable if the person was pre-disposed to commit the offense and the public officer or employee, or agent of either, merely affords to that person the opportunity or facility for committing an offense.

720 Ill. Comp. Stat. 5/7-12. The Seventh Circuit, interpreting this Illinois statute, has held that entrapment requires proof: (1) that the concept of committing the offense originated with the state or its agent, (2) and that the state actively encouraged the defendant to commit the offense, (3) for the purpose of obtaining evidence for the defendant's prosecution, and (4) that the defendant was not predisposed to commit the offense. *Humphrey v. Staszak,* 148 F.3d 719, 724 (7th Cir. 1998).

The resolution of this appeal turns largely on what the record shows the police officers knew about Fridley's alleged affirmative defense at the time he was arrested.

Both parties point to *Estate of Dietrich v. Burrows,* 167 F.3d 1007 (6th Cir. 1999), and *Painter,* 185 F.3d 557, in support of their arguments. The holdings of *Dietrich* and *Painter* both involve Ohio Rev. Code § 2923.12(C), which provides an affirmative defense to the charge of carrying a concealed weapon. These cases hold that if a defendant is engaged in an activity giving rise to a reasonable cause to fear a criminal attack or engaged in a business particularly susceptible to a criminal attack, he is protected by the affirmative defense. *See Dietrich,* 167 F.3d at 1011 (citing Ohio Rev. Code § 2923.12(C)(1)); *Painter,* 185 F.3d at 565 n.10 (citing Ohio Rev. Code § 2923.12(C)(2)). Moreover, in both cases the police officers facing § 1983 liability personally knew the suspects and knew, prior to the arrest, that the suspects' professions made them susceptible to criminal attack.

In *Dietrich,* this court held that the officers did not have probable cause to arrest an individual when they knew of "facts and circumstances that conclusively established, at the time of the [individual's] arrest[ ]," that the individual had an affirmative defense to the crime for which he was detained. 167 F.3d at 1012. The court expounded on this rule in *Painter,* holding that probable cause determinations include "facts and circumstances establishing a statutorily legitimated affirmative justification for the suspected criminal act." 185 F.3d at 570 (citing *Dietrich,* 167 F.3d at 1013-14). In an attempt to confine that rule, however, the court made two important findings. First, it held "that a peace officer, in assessing probable cause to effect an arrest, *may not ignore information known to him* which proves that the suspect is protected by an affirmative legal justification." *Painter,* 185 F.3d at 571 (emphasis added). By the court's plain language, it is

clear that a police officer is not required to inquire into facts and circumstances in an effort to discover if the suspect has an affirmative defense. The officer may not ignore information which becomes available in the course of routine investigations, but it is not a routine part of the prearrest investigation for police officers to inquire into affirmative defenses. Second, the *Painter* court held in a footnote:

> [T]his forum emphasizes that it does not mandate that law enforcement operatives should conduct *quasi-trials* as a necessary predicate to the warrantless arrest of perpetrators. . . . Rather, this court . . . merely resolves that, where a reasonable police officer would *conclusively know* that an investigative target's behavior is protected by a legally cognizable affirmative defense, that officer lacks a legal foundation to arrest that person for that behavior.

Id. at n.21 (emphasis added). Again, the court was emphasizing that the probable cause determination turns on what the officers knew at the time of the arrest. In neither decision does the court hold that the probable cause determination requires an examination of a suspect's legal defenses. Even if the circumstances suggest that a suspect may have an affirmative defense, if a reasonable officer would not "conclusively know" that the suspect is protected by the defense, then he is free to arrest the suspect provided there is probable cause to do so.

B.

To succeed in this appeal, Fridley must produce facts which create a genuine issue of material fact regarding the police officers' knowledge of his affirmative defense. *See*

Anderson, 477 U.S. at 248; *Painter,* 185 F.3d at 569 (citing *Stemler v. City of Florence,* 126 F.3d 856, 871 (6th Cir. 1997)). Fridley must provide facts such that a reasonable jury could conclude that: (1) the police knew that Fridley was induced by their actions, or the actions of their agent, and (2) the police knew Fridley lacked predisposition to commit the crime for which he was arrested. *See People v. Rivas,* 707 N.E.2d 159, 169 (Ill. Ct. App. 1998). A review of the record, read in a light most favorable to Fridley, demonstrates that the defendants did not know of any facts or circumstances establishing that he had an affirmative defense. While the officers may have known that Fridley was induced, they had no knowledge that he lacked predisposition. Failing to sustain this burden, Fridley cannot succeed on his § 1983 action.

The facts strongly suggest that Horrighs and the other defendants knew Fridley was induced, especially when viewed in a light most favorable to Fridley. Although Horrighs did not monitor Gluzsek's conversations with Fridley, he worked directly with Gluzsek and knew that Gluzsek induced Fridley to travel to Illinois to sell the parts and VIN tags. In his deposition, Horrighs attempted to hide behind a shield of ignorance and argue that he never instructed Gluzsek on what to do or say. It is undisputed, however, that Horrighs sought and obtained approval to wire $500 to Fridley to induce him to travel to Illinois. Each of the defendants knew that if they failed to front the money, Fridley would not have traveled to Illinois and would not have engaged in an illegal act there. Horrighs and the others also knew that Gluzsek placed over 10 telephone calls to Fridley, actively encouraging him to travel to Illinois or to send the VIN tags to Illinois by mail. Fridley's original advertisement only offered to sell two

Corvettes. It was upon Gluzsek's inquiries that the negotiations to sell the Corvette parts began, and it was only upon Gluzsek's insistence and wiring of $500 that Fridley undertook the trip to Illinois. Under the rule announced by *Humphrey,* it is clear that the concept of committing the offense originated with the state or its agent, and that the state actively encouraged the defendant to commit the offense for the purpose of obtaining evidence for the defendant's prosecution. The action of these officials is, to put it mildly, most unattractive.

Still, Fridley's effort to prove that he was entrapped fails, because none of the officers have been shown to have known, at the time of the arrest, that Fridley lacked predisposition. First, even in a light most favorable to Fridley, it is clear that he *was* predisposed to commit an act that was illegal in Illinois, because the sale or exchange of detached VIN tags violated Illinois law. *See* 625 Ill. Comp. Stat. 5/4-103(a)(5). Fridley implicitly accepts the conclusion that he was predisposed, and instead argues that his actions were legal in Ohio. Be that as it may, and the district court takes issue with this argument by Fridley, it is irrelevant to the present inquiry. In his deposition, Fridley admitted that during his second telephone conversation with Gluzsek, they were negotiating over the specific parts that Fridley would sell. Although it is not clear how the two began discussing Fridley's Corvette parts with detached VIN tags, it is clear from Fridley's deposition testimony that he was willing to sell Gluzsek any of his Corvette parts, including those with their VIN tags detached. Indeed, believing his actions were legal in Ohio, Fridley had no reason *not* to sell Gluzsek the parts and detached VIN tags. Fridley's hesitance to travel to Illinois was motivated by his concern for

the expense of doing so and his fear that Gluzsek would not go through with the sale. It is clear that once the negotiations began, Fridley willingly offered the parts to Gluzsek.

As a second matter, and as discussed earlier, the law does not hold that probable cause is defeated by what the officers should have known. Here, Fridley can point to no fact or circumstance demonstrating that the police had conclusive knowledge that he lacked predisposition, and thus was entrapped. The only evidence Fridley points to is his expert's affidavit. That document concludes that the officers should have investigated Fridley's predisposition. As stated, however, the probable cause determination turns on what a reasonable police officer conclusively knew about a suspect's affirmative defenses at the time of arrest. While officers cannot ignore exculpatory facts in reaching a probable cause-determination, *see Gardenhire v. Schubert,* 205 F.3d 303, 318 (6th Cir. 2000), it is not the rule that they must investigate a defendant's legal defenses prior to making an arrest. While reasonably well-trained officers should have been on notice that the actions of these defendants, and their agent Gluzsek, were likely to raise entrapment as a defense to any subsequent prosecution, probable cause is found when a reasonable officer could find that a crime is being committed. Had the defendants not blindly relied on their informant, they may have called off the investigation after determining that the possibility of a successful prosecution was slim. Nevertheless, because Fridley fails to provide any facts demonstrating that these defendants conclusively knew he lacked predisposition, his § 1983 claim fails. Fridley's "knew, or should have known" standard risks turning affirmative defenses into causes of action.

III.

Finally, we decline to credit Fridley's argument that the defendants are collaterally estopped from arguing on appeal that his arrest was supported by probable cause. "Collateral estoppel will apply where (1) the law of collateral estoppel in the state in which the issue was litigated would preclude relitigation of such issue, and (2) the issue was fully and fairly litigated in state court." *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 461 (6th Cir. 1999) (citing 28 U.S.C. § 1738). In Illinois, a party seeking to invoke the collateral estoppel doctrine must show: (1) that the issue was raised and litigated previously; (2) that the determination of the issue was a critical part of the final judgment; and (3) that the issue sought to be precluded is the same one litigated previously. *People v. Daniels*, 718 N.E.2d 149, 162 (Ill. 1999). No Illinois court has ever issued a final decision indicating whether Fridley's arrest was supported by probable cause, and therefore his argument fails.

IV.

For these reasons, we **AFFIRM** the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON

MARK S. FRIDLEY, et al.,	:	
Plaintiff(s),	:	Case No.C-3-99-008
-vs-	:	CHIEF JUDGE WALTER HERBERT RICE
WALTER HORRIGS, et al.,	:	
Defendant(s).	:	

JUDGMENT IN A CIVIL CASE
(Filed Aug. 16, 2000)

JURY VERDICT: This action came before the Court for a trial by jury. The issues have been tried and the Jury has rendered its verdict.

X **DECISION BY COURT**: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED: that the Court sustains Plaintiff's Motion for Certification of Final Judgment pursuant to Fed. R. Civ. P. 54(b) and to Delay the Damages Hearing against Gluszek (Doc. #72). Further, there is no just cause for delay and, pursuant to Rule 54(b), the Court directs that final judgment be entered in favor of Defendants Walter Horrigs, Duane Hill, Fred Brown, Dave Poeschel and Frank Wallace and against Plaintiffs, dismissing their claims against those Defendants with prejudice.

Date: August 16, 2000

Kenneth J. Murphy, Clerk
By: /s/ Paula J. Ruppert
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

MARK S. FRIDLEY, et al.,	:	
Plaintiffs,	:	Case No.C-3-99-008
vs.	:	CHIEF JUDGE WALTER HERBERT RICE
WALTER HORRIGS, et al.,	:	
Defendants.	:	(Filed Aug. 3, 2000)
	:	

DECISION AND ENTRY OVERRULING PLAINTIFFS' OBJECTIONS (DOC. #67) TO REPORT AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE (DOC. #63); PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (DOC. #49) OVERRULED; DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DOC. #58) SUSTAINED; PLAINTIFFS' CLAIMS AGAINST DONALD NEAL DISMISSED WITHOUT PREJUDICE FOR WANT OF PROSECUTION; CONFERENCE CALL SET TO ESTABLISH HEARING DATE TO DETERMINE PLAINTIFFS' DAMAGES AGAINST DEFENDANT DONALD GLUSZEK; PLAINTIFFS' CLAIMS AGAINST OTHER DEFENDANTS DISMISSED WITH PREJUDICE

On September 2, 1997, Plaintiff Mark Fridley ("Plaintiff") traveled from his home in Ohio to Illinois, where he exchanged car parts, titles and vehicle identification numbers for the sum of $5,000. Unbeknownst to the Plaintiff, those with whom he completed that transaction

were an informant and officers of the Illinois Secretary of State Police. Under Illinois law, it is illegal to sell a vehicle identification number which has been removed from the vehicle to which it had originally been attached. *See* 625 ILCS § 5/4-103(a)(5) ("§ 5/4-103(a)(5)"). As a consequence, he was arrested, incarcerated until being released the following day and subsequently prosecuted for violating Illinois law. During that prosecution, Plaintiff moved to dismiss the charges, claiming that he was the victim of entrapment. The trial court did not rule upon that request; rather, at the request of the prosecutor, the charges against Plaintiff were dismissed without prejudice.

The Plaintiff then initiated this litigation, setting forth four federal claims under 42 U.S.C. § 1983, to wit: 1) a claim that he was arrested without probable cause, in violation of the Fourth Amendment; 2) a claim that he was maliciously prosecuted, in violation of the Fourth Amendment; 3) a claim that he was denied the assistance of counsel, in violation of the Sixth Amendment; and 4) a claim that he was deprived of his property without due process of law, in violation of the Fourteenth Amendment. In addition, he has set forth claims of false arrest/imprisonment and malicious prosecution under the common law of Illinois.[1]

This Court referred this litigation to United States Magistrate Judge Michael Merz, for purposes, *inter alia,* of

[1] The other Plaintiff, Denise Fridley (the wife of Mark Fridley), has set forth a derivative claim of loss of consortium. Since her claim is dependent upon her husband's claims, no further discussion of the loss of consortium claim will be necessary. From this point forward, the Court will refer to only one Plaintiff, Mark Fridley.

a Report and Recommendations on dispositive motions. On June 14, 2000, that judicial officer filed his Report and Recommendations, in which he recommended that this Court enter summary judgment in favor of the Defendants on all claims set forth by the Plaintiffs.[2] *See* Doc. #63. In addition, Judge Merz recommended that this Court overrule the Plaintiffs' Motion for Partial Summary Judgment (Doc. #49).[3] This case is now before this Court on the Plaintiffs' Objections to the Report and Recommendations of the Magistrate Judge. *See* Doc. #67. In accordance with 28 U.S.C. § 636(b)(1), this Court must conduct a *de novo* review of that judicial filing. *See Roland v. Johnson,* 856 F.2d 764, 768-69 (6th Cir. 1988); *Brown v. Wesley's Quaker Maid, Inc.,* 771 F.2d 952, 954 (6th Cir.

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[2] It should be noted that a default has been entered against one Defendant, Donald Gluszek. The Plaintiffs have failed to serve another Defendant, Donald Neal. The other Defendants, Walter Horrigs, Duane Hill, Fred Brown, Dave Poeschel and Frank Wallace, are officers who were employed by the Illinois Secretary of State Police when the events giving rise to this litigation occurred. Gluszek acted as an informant for those officers. Judge Merz recommended that this Court set a damages hearing on the default against Gluszek and that the Court dismiss, without prejudice, the Plaintiffs' claims against Neal. The Plaintiffs have not objected to those recommendations, and the Court concurs with both of them. Throughout this Decision, the Court uses "Defendants" to refer to the Defendants other than Gluszek and Neal.

[3] With that motion, Plaintiff sought summary judgment, as to liability, on his claims under § 1983 that the Defendants had arrested him without probable cause in violation of the Fourth Amendment, had maliciously prosecuted him in violation of the Fourth Amendment and had deprived him of property without due process of law in violation of the Fourteenth Amendment. In addition, Plaintiff sought summary judgment on the Defendants' defense that they were protected by the doctrine of qualified immunity. Plaintiff also sought summary judgment, as to liability, on his claims of false arrest/false imprisonment and malicious prosecution under the Illinois common law.

1985), *cert. denied,* 479 U.S. 830 (1986); *EEOC v. Keco Industries, Inc.,* 748 F.2d 1097, 1102 (6th Cir. 1984). This Court begins that *de novo* review by setting forth the standards which are applicable to all motions for summary judgment.

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). Of course, the moving party:

> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Id. at 323. *See also Boretti v. Wiscomb,* 930 F.2d 1150, 1156 (6th Cir. 1991) (The moving party has the "burden of showing that the pleadings, depositions, answers to interrogatories, admissions and affidavits in the record, construed favorably to the nonmoving party, do not raise a genuine issue of material fact for trial.") (quoting *Gutierrez v. Lynch,* 826 F.2d 1534, 1536 (6th Cir. 1987)). The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)). Thus, "[o]nce the moving party has met its initial burden, the nonmoving party must present evidence that creates a genuine issue of material fact making it necessary to resolve the difference at trial." *Talley v. Bravo Pitino Restaurant, Ltd.,* 61

F.3d 1241, 1245 (6th Cir. 1995). Read together, *Liberty Lobby* and *Celotex* stand for the proposition that a party may move for summary judgment by demonstrating that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion (now known as a motion for judgment as a matter of law. Fed.R.Civ.P. 50). *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989).

Once the burden of production has so shifted, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is not sufficient to "simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). *See also Michigan Protection and Advocacy Service, Inc. v. Babin*, 18 F.3d 337, 341 (6th Cir. 1994) ("The plaintiff must present more than a scintilla of evidence in support of his position; the evidence must be such that a jury could reasonably find for the plaintiff."). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex Corp.*, 477 U.S. at 324. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Summary judgment shall be denied "[i]f there are . . . 'genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" *Hancock v. Dodson*, 958 F.2d 1367, 1374 (6th Cir. 1992) (citation omitted). Of course, in determining whether a

genuine issue of material fact exists, a court must assume as true the evidence of the nonmoving party and draw all *reasonable* inferences in the favor of that party. *Anderson,* 477 U.S. at 255 (emphasis added). If the parties present conflicting evidence, a court may not decide which evidence to believe, by determining which parties' affiants are more credible; rather, credibility determinations must be left to the fact-finder. 10A Wright, Miller & Kane, *Federal Practice and Procedure,* § 2726. In ruling on a motion for summary judgment (in other words, in determining whether there is a genuine issue of material fact), "[a] district court is not . . . obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *InterRoyal Corp. v. Sponseller,* 889 F.2d 108, 111 (6th Cir. 1989), *cert. denied,* 494 U.S. 1091 (1990). *See also L.S. Heath & Son, Inc. v. AT & T Information Systems, Inc.,* 9 F.3d 561 (7th Cir. 1993); *Skotak v. Tenneco Resins, Inc.,* 953 F.2d 909, 915 n. 7 (5th Cir.), *cert. denied,* 506 U.S. 832 (1992) ("Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment. . . . "). Thus, a court is entitled to rely, in determining whether a genuine issue of material fact exists on a particular issue, only upon those portions of the verified pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

As an initial matter, the Plaintiff has not objected to Judge Merz' recommendations that summary judgment be entered in favor of the Defendants on his (Plaintiff's) § 1983 claims under Sixth Amendment and the Due Process Clause of the Fourteenth Amendment (his Third

and Fourth Claims for Relief). In the absence of any objection, the Court adopts the Report and Recommendations as it relates to those two claims.[4] The central issue raised by the other claims (both state and federal) is whether the Defendants had probable cause to arrest Plaintiff.[5] For reasons which follow, the Court concludes

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[4] Objections to a Magistrate Judge's report are waived, if not raised. *See Thomas v. Arn,* 474 U.S. 140, 155 (1985); *Willis v. Sullivan,* 931 F.2d 390, 400-01 (6th Cir. 1991). Moreover, Plaintiff's Sixth Amendment and due process claims were clearly without merit. Plaintiff's Sixth Amendment/denial of counsel claim was predicated upon the assertion that, after having been arrested, he was unable to call his attorney at Area Code 937 from the Sangamon County Jail, located in Springfield, Illinois, where he was being held. Judge Merz concluded that the right to counsel had not attached at the time Mark Fridley was unable to make that call. Moreover, each of the Defendants states in his affidavit that he had no control over the policies of the jail. With respect to the due process claim, Mark Fridley has alleged that the Defendants deprived him of the property that was seized from him when he was arrested. Although all of that property was ultimately returned to him, Mark Fridley was deprived of possession of it for a period of time. Judge Merz correctly reasoned that the Defendants were entitled to summary judgment on this procedural due process claim, because Plaintiff had failed to allege and to present evidence that he was without state, post-deprivation remedies.

[5] No citation of authority is necessary to demonstrate that the absence of probable cause is an element of Plaintiff's claim that his arrest violated the Fourth Amendment. The existence of probable cause is an absolute bar to Plaintiff's state law claims of false arrest and false imprisonment. *Adekunle v. Hoban,* 1999 WL 618106 (N.D.Ill. 1999) (citing *Kincaid v. Ames Dept. Stores, Inc.,* 283 Ill. App.3d 555, 670 N.E.2d 1103 (1996) and *Martel v. City of Chicago,* 223 Ill. App.3d 1028 584 N.E.2d 157 (1991). In addition, the non-existence of probable cause is an element of Plaintiff's state and federal law claims of malicious prosecution. *See e.g., Randall v. Lemke,* 311 Ill. App.3d 848, 726 N.E.2d 183 (2000) (Illinois common law claim of malicious prosecution); *Coogan v. City of Wixom,* 820 F.2d 170 (6th Cir. 1987) (claim of malicious prosecution under § 1983 includes the elements of a common law claim of malicious prosecution).

that the evidence does not raise a genuine issue of material fact as to whether they were without such probable cause.

As is indicated, § 5/4-103(a)(5) makes it illegal to sell a vehicle identification number which has been removed from the vehicle to which it had originally been attached. On September 2, 1997, the date of Plaintiff's arrest, arresting officers observed him sell vehicle identification numbers *which had been removed from the vehicle to which they had originally been attached;* therefore, they had probable cause to believe that he had violated § 5/4-103(a)(5). In other words, the Defendants observed the Plaintiff violate that statute in their presence. Nevertheless, the Plaintiff argues that the officers were without probable cause to arrest him, because he was entrapped into committing the offense. As a means of analysis, the Court will set forth a brief overview of the factual circumstances giving rise to this argument, following which it will turn to the relevant legal principles.

It is undisputed that the Plaintiff traveled to Illinois to engage in the transaction which led to his arrest as a result of the efforts of Donald Gluszek ("Gluszek"), an informant utilized by the Defendants. In June, 1997, Gluszek was arrested in connection with a stolen Chevrolet Corvette. During an interview with officers following his arrest, he indicated that he was aware of other individuals who were involved in the stolen car business. Gluszek had seen an advertisement which Plaintiff had placed in *Hemmings,* a magazine of interest to traders with circulation throughout the United States, and he informed Defendant Walter Horrigs that Plaintiff was selling car parts, titles and vehicle identification numbers. The Defendants were interested, and Gluszek began

negotiating with the Plaintiff, at their insistence. Gluszek called the Plaintiff at least 10 times to convince him to come to Illinois to sell car parts and the like. Plaintiff refused to make such a trip, unless he were paid a down payment of $500.00. That sum was wired to Plaintiff in Ohio, by the Defendants. Thereafter, the Plaintiff traveled to Illinois and consummated the transaction which resulted in his arrest, incarceration and prosecution. It is likewise unquestioned that the Plaintiff was the lawful owner of all property that was sold on September 2, 1997.

Entrapment, a statutory or affirmative defense in Illinois, is contained in 720 ILCS § 5/7-12, which provides:

> A person is not guilty of an offense if his or her conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of that person. However, this Section is inapplicable if the person was pre-disposed to commit the offense and the public officer or employee, or agent of either, merely affords to that person the opportunity or facility for committing an offense.

In *Humphrey v. Staszak,* 148 F.3d 716 (7th Cir. 1998), the Seventh Circuit elaborated upon the entrapment defense under Illinois law:

> Under the Illinois entrapment statute, "[a] person is not guilty of an offense if his conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of such person." *People v. Wielgos,* 142 Ill.2d 133, 154 Ill.Dec. 640, 568 N.E.2d 861, 863 (1991) (citing Ill.Rev.Stat. 1985, ch. 38, par. 7-12). The concept of entrapment provides an affirmative defense to otherwise culpable conduct on the theory that the

> defendant was not predisposed to commit the criminal act and instead was induced by actions of a government agent to commit the offense. *See id.* Entrapment requires four elements: "(1) [t]he concept of committing the offense originates with the State or its agent, (2) who actively encourages the defendant to commit the offense, (3) for the purpose of obtaining evidence for [defendant's] prosecution, and (4) the defendant was not predisposed to commit the offense." *Id.* In the criminal context, a defendant is entitled to an entrapment instruction only if he presents minimal evidence supporting each element. *Id.* at 862-63.

Id. at 723-24.

Judge Merz has indicated that a key question is whether this Court must apply Sixth or Seventh Circuit law to the Plaintiff's § 1983 claims.[6] He indicated in his Report and Recommendations that Seventh Circuit law was applicable, since the arrest had occurred in Illinois, a state within that Circuit. This Court disagrees. The Court has been unable to locate any case law which would support the position that a District Court within the Sixth Circuit should treat the decisions of another Circuit (rather than those of the Sixth) as the controlling precedent, when resolving a federal law claim.[7] On the contrary,

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[6] It should be noted that the parties are in agreement that the Plaintiffs' state law claims are governed by the substantive law of Illinois.

[7] In their Motion for Summary Judgment, the Defendants argued, in the alternative, that they had probable cause to arrest Plaintiff and that they were protected by the doctrine of qualified immunity. Qualified immunity has two components, to wit: that a specific constitutional right of the plaintiff was violated, and that the right was clearly

(Continued on following page)

the Sixth Circuit has indicated that its precedent is applicable to the resolution of a federal law claim, despite the fact that the lawsuit was transferred from another Circuit pursuant to 28 U.S.C. § 1404(a), in part because federal law is presumed to be consistent. *EEOC v. Northwest Airlines,* 188 F.3d 695, 700-01 (6th Cir. 1999). *Accord, Bradley v. United States,* 161 F.3d 777, 782 n. 4 (4th Cir. 1998).

Moreover, the relevant law of the Seventh Circuit does not differ from that of the Sixth. In response to the Plaintiff's argument that the officers were obligated to consider his affirmative defense of entrapment, before arresting him, Judge Merz, having concluded that Seventh Circuit precedent was controlling, cited *Eversole v. Steele,* 59 F.3d 710 (7th Cir. 1995), for the proposition that officers do not have an obligation to conduct a further investigation in an effort to discover exculpatory evidence, if they have probable cause to arrest a suspect. The Sixth Circuit has announced a similar rule. *See e.g., Ahlers v. Schebil,* 188 F.3d 365, 371 (6th Cir. 1999) ("Once probable cause is

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established at the time of the incident. *See e.g., Wilson v. Layne,* 526 U.S. 603 (1999). Herein, the Plaintiff contends that the Defendants violated his constitutional right, guaranteed by the Fourth Amendment, to be free from an arrest which was not supported by probable cause. The Sixth and Seventh Circuits do not differ on the issue of whether an arrest without probable cause violates the Fourth Amendment. The Court will assume, purely *arguendo,* that, since the arrest took place within the Seventh Circuit, its decisions are relevant to the question of whether the right in question was clearly established. However, given that the evidence does not raise a genuine issue of material fact as to whether the Defendants were without probable cause to arrest Plaintiff, it is not necessary to explore the second component of the qualified immunity analysis and to decide whether Seventh Circuit precedent is controlling in that regard.

established, an officer is under no duty to investigate further or to look for additional evidence which may exculpate the accused," citing *Schertz v. Waupaca County,* 875 F.2d 578, 583 (7th Cir. 1989), and *Criss v. City of Kent,* 867 F.2d 259, 263 (6th Cir. 1988)). Thus, there is no conflict between Sixth Circuit case law and the Seventh Circuit's decision in *Eversole.* Therefore, for this and all of the above reasons, the Court will apply the law of the Sixth Circuit to the issues presented herein.

The Plaintiff places primary reliance upon a line of cases, the progenitor of which is *Estate of Dietrich v. Burrows,* 167 F.3d 1007 (6th Cir. 1999).[8] Kenneth Dietrich, one of the plaintiffs therein, was the former Chief of Police for Perkins Township, Ohio, while the other plaintiff was his son. After leaving his position as Chief of Police, Kenneth Perkins had formed an security/investigative agency serving that community. At some point thereafter, the plaintiffs informed the Chief of Police for Perkins Township that they intended to begin offering armed money courier service to area businesses, in order to ensure the safe delivery of their customers' cash to the intended destinations. While the plaintiffs were engaged in the activity, the defendants, law enforcement officers for Perkins Township, Ohio, arrested the plaintiffs for carrying concealed weapons, in violation of Ohio Revised Code § 2923.12(A). After those charges had been dismissed, the plaintiffs sued, setting forth, *inter alia,* a claim under § 1983, alleging that their rights had been violated

[8] Purely as a parenthetical aside, the Court has not located any Seventh Circuit authority, contrary to the legal principles applied in *Estate of Dietrich.*

because they had been arrested without probable cause. The District Court had overruled the defendants' motion for summary judgment, which was predicated in part on the doctrine of qualified immunity. The defendants appealed, arguing that they had probable cause to arrest the defendants, since the plaintiffs had unquestionably violated § 2923.12(A). The Sixth Circuit rejected that argument, since the facts known to the officers at the time of the arrest, coupled with the affirmative defense contained in § 2923.12(C)(1),[9] made it clear that the officers did not have probable cause to believe that an offense had been committed, was being committed or was about to be committed. The Sixth Circuit did not, however, establish a rule that an officer must conduct an investigation into an alleged affirmative defense before arresting someone, about whom the officer has probable cause. Indeed, the Sixth Circuit distinguished a case relied upon by the

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[9] Section 2923.12(C)(1) provides:

(C) It is an affirmative defense to a charge under this section of carrying or having control of a weapon other than dangerous ordnance, that the actor was not otherwise prohibited by law from having the weapon, and that any of the following apply:

(1) The weapon was carried or kept ready at hand by the actor for defensive purposes, while the actor was engaged in or was going to or from the actor's lawful business or occupation, which business or occupation was of such character or was necessarily carried on in such manner or at such a time or place as to render the actor particularly susceptible to criminal attack, such as would justify a prudent person in going armed.

defendants, *Weible v. City of Akron,* 1991 WL 77187 (Ohio App. 1991),[10] writing:

> Unlike the officers in that case, who could not have known of Weible's justification for carrying a concealed weapon prior to her arrest, the officers in this case had full knowledge of facts and circumstances that conclusively established, at the time of the Dietrichs' arrests, that the plaintiffs were justified – by statute – in carrying concealed weapons during their work. Consequently, none of the defendants had probable cause at the time of the arrests to believe the plaintiffs had violated, were violating, or were about to violate the law. The district court thus properly ruled that the Dietrichs had made out a valid Fourth Amendment claim.

167 F.3d at 1012. In rejecting the defendants' argument that the right upon which the plaintiffs were relying was not clearly established, the Sixth Circuit wrote:

> The defendants contend that it was not "clearly established" in 1991 that a police officer must analyze the validity of an arrestee's claim of an affirmative defense to a charge of carrying a concealed firearm before effecting an arrest for that crime. Such an argument, however, misstates the relevant inquiry for the court in this case. The law has been clearly established since

[10] In *Weible,* the court concluded that officers had probable cause to arrest the plaintiff for carrying a concealed weapon, despite her protestations that she had a right to carry the weapon for her protection due to the fact that she had been raped eight months earlier. The court indicated that an officer was not required to evaluate a person's claim to an affirmative defense before arresting her.

> at least the Supreme Court's decision in *Carroll v. United States,* 267 U.S. 132, 162 (1925), that probable cause determinations involve an examination of all facts and circumstances *within an officer's knowledge at the time of an arrest.*
>
> The evidence before the district court in this case was uncontroverted that when the defendants prepared to arrest the Dietrichs for carrying concealed weapons, the officers knew who the plaintiffs were and also were fully aware that the plaintiffs were carrying firearms for the purpose of protection in the course of their occupations. Consequently, the defendants knew, or should have known, that under the circumstances presented, the plaintiffs were not engaged in activities violating the prohibitions of O.R.C. § 2923.12. Even in 1991, the law was clearly established that, absent probable cause to believe that an offense had been committed, was being committed, or was about to be committed, officers may not arrest an individual. The district court, therefore, appropriately concluded that the defendants were not entitled to qualified immunity from prosecution on the Dietrichs' Fourth Amendment claim.

Id. at 1012-13 (emphasis in the original).[11]

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[11] In *Painter v. Robertson,* 185 F.3d 557 (6th Cir. 1999), the Sixth Circuit applied the principles announced in *Estate of Dietrich,* to conclude that the defendants were without probable cause to arrest the plaintiff for carrying a concealed weapon, in violation of Ohio law, since they had knowledge of facts establishing the plaintiff's affirmative defense to that charge.

Thus, *Estate of Dietrich* merely holds that, in determining whether he has probable cause to arrest someone, an officer is not free to ignore exculpatory information *known to him,* merely because that exculpatory information would establish an affirmative defense. In other words, if an officer has knowledge of facts which establish an affirmative defense, he is without probable cause to arrest, even though he has probable cause to believe that the person engaged in activity which constitute all elements of the offense. However, the Sixth Circuit did not, therein, suggest that an officer must *investigate* a person's claims to an affirmative defense, i.e., to determine if facts exist then unknown to him, or risk being sued for violating the Fourth Amendment. Accordingly, the Court turns to the question of whether the Defendants in this litigation possessed knowledge of facts which would have established Plaintiff's entrapment defense to the charge that he had violated § 5/4-103(a)(5).

As an initial matter, the Plaintiff argues that Judge Merz erroneously absolved the Defendants of their obligation of proving that he (Plaintiff) was predisposed to commit the offense. As the Plaintiff argues, predisposition is an element of entrapment under Illinois law. If the government has induced the defendant to commit the offense, he can be found guilty only if he was predisposed to commit it. Like federal law, when a criminal defendant has submitted sufficient evidence to raise an entrapment defense, the government has the obligation of proving predisposition beyond a reasonable doubt. *See e.g., People v. Placek,* 184 Ill.2d 370, 380-81, 704 N.E.2d 393, 397-98 (1998). However, herein, the issue is whether the Defendants had probable cause to arrest Plaintiff, because he was violating § 5/4-103(a)(5), not whether there would

have been sufficient evidence to convict him. As is discussed above, the Sixth Circuit has held that probable cause is vitiated when the arresting officer has *knowledge* of facts which establish a defense to a crime. Moreover, there is no requirement that officers conduct an *investigation* into possible affirmative defenses, in order to discover exculpatory evidence. Thus, while knowledge on the part of the officers, before they arrested Plaintiff, that he was not predisposed to commit the offense with which he was charged, might have negated the existence of probable cause (or at least raised a genuine issue of material fact on that issue),[12] the absence of knowledge of predisposition does not trigger a pre-arrest obligation on the part of the officers to investigate the existence of predisposition on the part of the person to be arrested, and does not affect the existence of probable cause to make that arrest.

The Plaintiff's entrapment defense appears to be somewhat unique. He has not presented evidence that Gluszek induced him to sell vehicle identification numbers which had been removed from the vehicle to which they had originally been attached, much less that the Defendants were aware of such inducement.[13] Moreover, there is no evidence that Gluszek encouraged the Plaintiff to remove those numbers. Rather, the Plaintiff contends that he was entrapped into committing the offense, by being induced to travel to Illinois to engage in a transaction, which, although illegal in that state, did not violate Ohio

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[12] There is no evidence that the Defendants had any knowledge concerning the Plaintiff's predisposition, prior to arresting him.

[13] The uncontroverted evidence is that the Defendants did not monitor the telephone calls between the Plaintiff and Gluszek.

law.[14] The Court will assume for sake of argument that an entrapment defense could be established under Illinois law, by a person claiming to have been induced into traveling to that state to engage in activity which was legal in the state of his residence. It cannot be questioned that the Defendants induced the Plaintiff to travel to Illinois, since they directed Gluszek to communicate with him and provided the sum of $500.00 for a down payment to convince Plaintiff to travel from Ohio to Illinois. However, there is simply no evidence that the Defendants knew that the sale of vehicle identification numbers, which had been removed from the vehicle to which they had been originally attached, was legal in Ohio. Even if

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[14] It may be that the Plaintiff has taken a broader view. He may be arguing that, whenever officers engage in any type of inducement, such as offering to purchase contraband from an individual, they have knowledge of sufficient facts to know or that they should have known that the individual was entrapped and, therefore, did not commit an offense. If that is the Plaintiff's argument, the Court cannot agree with it. As has been discussed above, the Sixth Circuit does not permit an officer to ignore facts *known* to him when making an arrest, merely because those facts would establish an affirmative defense to an offense, rather than negating an essential element of that offense. *Estate of Dietrich, supra.* However, the Sixth Circuit has also held that, once probable cause is established, an officer need not *investigate* further to uncover exculpatory evidence. *Ahlers, supra.* Moreover, the Court has not located a single decision which remotely suggests that an officer must *investigate* the possibility of an entrapment defense, before arresting someone, merely because the officer has offered some sort of an inducement, such as offering to purchase contraband. Such a holding would equate entrapment with the mere act of providing an opportunity to commit a crime to one already predisposed to do so. *Cf. United States v. Reed,* ___ F.3d ___, 2000 WL 868474 (6th Cir. 2000) (officers had probable cause to arrest defendant for trespass, despite the fact that they failed to investigate whether he had a privilege to be on the premises).

one were to assume that a reasonable officer is knowledgeable about the law of all 50 states, the Ohio statute does not expressly state or conclusively establish that the Plaintiff's conduct would have passed legal muster in Ohio. Ohio Revised Code § 4549.62, which defines offenses relating to tampering with vehicle identification numbers, provides, in pertinent part:

> (A) No person shall, with purpose to conceal or destroy the identity of a vehicle or vehicle part, remove, deface, cover, alter, or destroy any vehicle identification number or derivative thereof on a vehicle or vehicle part.
>
> * * *
>
> (D)(1) No person shall buy, offer to buy, sell, offer to sell, receive, dispose of, conceal, or, except as provided in division (D)(4) of this section, possess any vehicle or vehicle part with knowledge that the vehicle identification number or a derivative thereof has been removed, defaced, covered, altered, or destroyed in such a manner that the identity of the vehicle or part cannot be determined by a visual examination of the number at the site where the manufacturer placed the number.
>
> * * *
>
> (3) Divisions (A), (B), and (D)(1) and (2) of this section do not apply to the good faith acquisition and disposition of vehicles and vehicle parts as junk or scrap in the ordinary course of business by a scrap metal processing facility as defined in division (E) of section 4737.05 of the Revised Code or by a motor vehicle salvage dealer licensed under Chapter 4738. of the Revised Code. This division (D)(3) does not create an element of an offense or an affirmative defense, or affect the

burden of proceeding with the evidence or burden of proof in a criminal proceeding.

(4)(a) Divisions (D)(1) and (2) of this section do not apply to the possession of an owner, or the owner's insurer, who provides satisfactory evidence of all of the following:

(I) That the vehicle identification number or derivative thereof on the vehicle or part has been removed, defaced, covered, altered, or destroyed, after the owner acquired such possession, by another person without the consent of the owner, by accident or other casualty not due to the owner's purpose to conceal or destroy the identity of the vehicle or vehicle part, or by ordinary wear and tear;

(ii) That the person is the owner of the vehicle as shown on a valid certificate of title issued by this state or certificate of title or other lawful evidence of title issued in another state, in a clear chain of title beginning with the manufacturer;

(iii) That the original identity of the vehicle can be established in a manner that excludes any reasonable probability that the vehicle has been stolen from another person.

Nothing in that statute says that it is lawful for the owner of a vehicle to remove vehicle identification numbers from a automobile or one of its parts and then sell the number separately. However, that is precisely what the Plaintiff did. Moreover, that statute makes it illegal to remove a vehicle number from an automobile for the purpose of destroying or concealing the identity of the automobile. Plaintiff arrived in Illinois with vehicle identification numbers which had been removed from

vehicles, which certainly dispels the idea that the Defendants knew that the Plaintiff was engaging in activity that was lawful in Ohio. Although that statute provides an owner's defense (*see* Ohio Revised Code § 4549.62(D)(4)),[15] that defense is limited to possession. It does not remotely suggest that the owner may sell vehicle identification numbers which have been removed from a vehicle or a vehicle part. Moreover, the owner must present evidence to establish the three elements of that defense. There is no indication that the Defendants, when they arrested the Plaintiff, were aware of facts which might have established that defense.

In sum, the Defendants had probable cause to believe that the Plaintiff was violating § 5/4-103(a)(5), when they observed him sell vehicle identification numbers which had been removed from the vehicle to which they had originally been attached. Moreover, the Defendants, unlike those in *Estate of Dietrich,* did not, at the time they arrested the Plaintiff, have knowledge of facts which would establish his affirmative defense of entrapment and thus, demonstrate that he had not committed an offense.[16]

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[15] A defense is also provided to operators of junk yards. There is no indication that the Plaintiff was involved in that industry.

[16] As did the Magistrate Judge, this Court rejects the Plaintiff's argument that the dismissal of charges against him has a collateral estoppel effect on whether he was entrapped. During his prosecution in Illinois state court, the Plaintiff moved to dismiss the charges against him, arguing that he had been entrapped. Before that motion could be ruled upon, the prosecution dismissed the case, without prejudice. The Sixth Circuit has repeatedly stressed that collateral estoppel is applicable in federal court, only if the law of collateral estoppel in the state in which the issue was litigated would preclude relitigation of that issue. *Markowitz v. Campbell,* 190 F.3d 455, 461 (6th Cir. 1999). Under

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Accordingly, the Court overrules the Plaintiffs' Objections (Doc. #67) to the Report and Recommendations of the Magistrate Judge (Doc. #63).[17] Said Report and

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Illinois law, collateral estoppel is applicable only when an issue has been actually litigated. *See e.g., Smith Trust & Savings Bank v. Young,* 312 Ill. App.3d 853, 727 N.E.2d 1042 (2000). Since the Plaintiff's entrapment defense was not actually litigated, the dismissal of the charges against him does not have a collateral estoppel effect in this litigation.

[17] In that filing, the Plaintiff makes a number of specific objections, many of which relate to Judge Merz' citation of evidence, such as the fact that he cited unauthenticated pages of Plaintiff's deposition testimony, which had been attached to the Defendants' motion, when the entirety of the transcript of that deposition had not been filed. At the same time they filed their Objections, the Plaintiffs filed a complete transcript of Mark Fridley's deposition. Given the fact that a complete transcript of that deposition has been filed, and, further, since this Court must conduct a *de novo* review of the evidence, Plaintiff has not suffered any prejudice as a result of Judge Merz' citation to unauthenticated pages from the transcript of his (Plaintiff's) deposition testimony. Plaintiff also argues that the Magistrate Judge mischaracterized evidence. None of those types of objections warrant detailed discussion, given that this Court must conduct a *de novo* review of the evidence. The Court will comment briefly upon two of the specific points raised by the Plaintiff, in order to explain why neither of those matters demonstrates the existence of a genuine issue of material fact.

First, Plaintiff argues that the Defendants were without reliable information concerning him, before he was arrested, since they did not possess any information concerning Gluszek's trustworthiness. This is not a case where officers obtained a search or arrest warrant on the basis of information, which had been supplied by an untrustworthy informant. Rather, the Defendants saw the Plaintiff sell vehicle identification numbers, in violation of § 5/4-103(a)(5). Thus, their probable cause was based upon their own observations, rather than those supplied by an informant. Consequently, the trustworthiness of Gluszek is not relevant.

Second, Plaintiff contends that Judge Merz improperly discounted the affidavit of his (Plaintiff's) expert witness, Michael D'Amico. Simply stated, the penultimate portion of that affidavit (essentially

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Recommendations are adopted. In so doing, the Court overrules the Plaintiffs' Motion for Partial Summary Judgment (Doc. #49), and sustains the Defendants' Motion for Summary Judgment (Doc. #58).

As is explained above, with the exception of his denial of counsel and deprivation of property without due process claims, the absence of probable cause is an essential element of all of the federal and state claims asserted by Plaintiff Mark Fridley. *See* p. 7, *supra*. Therefore, the Court's conclusion that the Defendants had probable cause to arrest him entitles them to summary judgment on all those claims.[18] As a result of the Court's rulings herein, the Plaintiffs' claims against all Defendants, other than Gluszek and Neal, are dismissed with prejudice.[19] The

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opining that the Defendants knew that Plaintiff had been entrapped) is conclusory and insufficient to raise a genuine issue of material fact. *See e.g., Doren v. Battle Creek Health System,* 187 F.3d 595, 598-99 (6th Cir. 1999) (conclusory affidavit from expert which fails to contain specific facts and merely restates the requirements of the law cannot create a genuine issue of material fact sufficient to defeat summary judgment); *Mitchell v. Toledo Hospital,* 964 F.2d 577, 584 (6th Cir. 1992) (holding that conclusory statements are insufficient to raise a genuine issue of material fact and, thus, cannot defeat a properly supported motion for summary judgment).

[18] Courts in Illinois have recognized that probable cause under the Fourth Amendment imposes a higher standard on law enforcement officials, than that which is applicable for common law torts. *See Lappin v. Costello,* 232 Ill. App.3d 1033, 598 N.E.2d 311 (1992). Therefore, this Court's conclusion that the Defendants had probable cause to arrest the Plaintiff, under the Fourth Amendment, means that they had probable cause under the Illinois common law.

[19] Since the loss of consortium claim of Denise Fridley is derivative of her husband's claims, the Court's conclusion herein that the Defendants, other than Gluszek and Neal, are entitled to summary judgment

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Plaintiffs' claims against Neal are dismissed without prejudice, for want of prosecution. The Court establishes a conference call on Friday, August 11, 2000, at 4:30 p.m., for the purpose of selecting a date for a damages hearing on Plaintiffs' claims against Gluszek. Only counsel for Plaintiff need participate in that conference call.

August 2, 2000

/s/ Walter Herbert Rice
WALTER HERBERT RICE,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

Copies to:

Counsel of record

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on her husband's claims necessarily means that those Defendants are also entitled to summary judgment on her loss of consortium claim.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON

MARK S. FRIDLEY, et al.,

Plaintiffs,

-vs-

WALTER HORRIGS, et al.,

Defendant.

Case No. C-3-99-008

Chief Judge Walter Herbert Rice

Magistrate Judge Michael R. Merz

REPORT AND RECOMMENDATION

(Filed Jun. 14, 2000)

This case is before the Court on Plaintiff Mark Fridley's Motion for Partial Summary Judgment (Doc. #49) and the Motion for Summary Judgment of Defendants Dwain Hill, Fred Brown, Walter Horrighs[1], David Poeschel, and Frank Wallace (the "Police Defendants") (Doc. #58).

The case was specially referred to the Magistrate Judge for all pre-trial matters, including filing a report and recommendations on dispositive motions, such as those for summary judgment (Doc. #2).

Plaintiffs Mark and Denise Fridley, husband and wife, brought this action under 42 U.S.C. §1983 for deprivation of rights guaranteed by the Fourth, Fifth, Sixth, and

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[1] Walter Horrighs is the person sued herein as "Walter Horrigs."

Fourteenth Amendments to the United States, Constitution (First Claim) and under Illinois common law for malicious prosecution (Second Claim) and false arrest/unlawful confinement (Third Claim). Mark Fridley avers he suffered the losses directly; Denise Fridley asserts a derivative loss of consortium claim.

The Defendant listed in the Complaint as "Don Neal" has never been served with process. Since more than 120 days have expired since the Complaint was filed, the Magistrate Judge *sua sponte* recommends the Complaint be dismissed without prejudice as to Defendant Neal, pursuant to Fed. R. Civ. P. 4(m).

Defendant Donald Gluszek defaulted after service, and default judgment as to liability was entered against him on August 2, 1999 (Doc. #24).

Plaintiff Mark Fridley seeks partial summary judgment of liability on all three of his claims, except the right to counsel portion of his §1983 claim, including a decision that none of the Police Defendants is entitled to his claimed qualified immunity defense. The Police Defendants seek dismissal of all of Mark Fridley's claims and ask the Court to decline the exercise of supplemental jurisdiction over Denis [sic] Fridley's loss of consortium claim.

SUMMARY JUDGMENT STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56.

On a motion for summary judgment, the movant has the burden of showing that there exists no *genuine* issue of *material* fact, and the evidence, together with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable to the party opposing the motion. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-59 (1970). Nevertheless, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis in original). Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Read together, *Liberty Lobby* and *Celotex* stand for the proposition that a party may move for summary judgment asserting that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion (now known as a motion for judgment as a matter of law. Fed. R. Civ. P. 50). *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1478 (6th Cir. 1989). If, after sufficient time for discovery, the opposing party is unable to demonstrate that he or she can do so under the *Liberty Lobby* criteria summary judgmant is appropriate. *Id.* The opposing party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment

may be granted." *Liberty Lobby,* 477 U.S. at 249-50, 106 S. Ct. at 2510-11 (citations omitted). "The mere possibility of a factual dispute is not enough." *Mitchell v. Toledo Hosp.*, 964 F. 2d 577, 582 (6th Cir. 1992) (quoting *Gregg v. Allen-Bradley Co.*, 801 F. 2d 859, 863 (6th Cir. 1986). Therefore a court must make a preliminary assessment of the evidence, in order to decide whether the plaintiff's evidence concerns a material issue and is more than de minimis. *Hartsel v. Keys*, 87 F. 3d 795 (6th Cir. 1996). "On summary judgment," moreover, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 991, 994, 8 L. Ed. 2d 176 (1962). Thus, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249, 106 S. Ct. at 2510.

> The moving party
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> > [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex, 477 U.S. at 323; *see also, Boretti v. Wiscomb*, 930 F.2d 1150, 1156 (6th Cir. 1991) (citation omitted). If the moving party meets this burden, the nonmoving party must go beyond the pleadings to show that there is a genuine issue for trial. *Matsushita*, 475 U.S. at 587; *Martin v. Ohio Turnpike Comm'n.*, 968 F. 2d 606, (6th Cir.

1992), *cert. denied*, 506 U.S. 1054, 113 S. Ct. 979, 122 L.Ed.2d 133 (1993).

In ruling on a motion for summary judgment (in other words, determining whether there is a genuine issue of material fact), "[a] district court is not . . . obligated to wade through and search the entire record for some specific facts that might support the nonmoving party's claim." *Interroyal Corp. v. Sponseller*, 889 F.2d 108, 111 (6th Cir. 1989), *cert. denied*, 494 U.S. 1091 (1990). Thus, in determining whether a genuine issue of material fact exists on a particular issue, a court is entitled to rely only upon those portions of the verified pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits submitted, specifically called to its attention by the parties.

The present motions for summary judgment are made after the conclusion of discovery in the case; in accordance with the Scheduling Order as amended, discovery was cut off as of February 29, 2000 (See Doc. # 14). The facts set forth in this Report are admitted or established by evidence competent under Fed. R. Civ. P. 56(e) and not controverted by opposing competent evidence.

ANALYSIS

Uncontroverted Facts

The Police Defendants, all sued here in their individual capacities, are all State of Illinois law enforcement officers. All of their acts with regard to Mark Fridley were done under color of state law.

In June 1997, Defendant Gluszek, known to Illinois law enforcement officials to have previously been involved

in Corvette "chop shop" operations (Howlett Dep. 10: 8-10), was arrested in Sangamon County, Illinois in connection with a stolen 1966 Chevrolet Corvette (Hill Dep. 12: 8-9). During an interview with Defendants Hill and Horrighs, he indicated he knew other people who were involved in the stolen car business (Hill Affidavit, Ex. C to Doc. #58). Defendant Hill relayed that information to the Illinois Secretary of State Police (Howlett Dep. 9: 6-8; Ex. C).

In May, 1997, Fridley placed an advertisement for the sale of car parts in *Hemmings*, a trader magazine known by him to be sold throughout the United States (Fridley Dep. 20: 5-18; 124: 23). As a vendor of car parts, Fridley has traveled to car shows outside of Ohio, which is his State of residence (Fridley Dep. 20: 5-18; 124: 23). In June 1997, Gluszek contacted Fridley in response to the Hemmings ad (Fridley Dep. 126: 12-17).

Sometime after Gluszek's arrest and initial interview, Gluszek told Horrighs that Fridley was selling parts, VIN tags, and titles (Horrighs Dep. 26: 14-17). The Secretary of State Police were interested and Gluszek began negotiating a purchase from Fridley at their instance. Numerous telephone conversations ensued during which Fridley told Gluszek he would need a downpayment of $500 in order to come to Illinois to make the sale and delivery. On or about August 19, 1997, $500 was wired to Fridley in Ohio (Wallace Affidavit, Exhibit D to Doc. #58).

On September 2, 1997, Fridley drove to Sangamon County with parts, VIN tags, and titles. Arriving at an agreed-upon site in the K Mart parking lot, he was approached by Defendants Gluszek, Horrighs, and Brown. After Fridley displayed the VIN tags and the parts, which were covered with a tarp on a trailer he was pulling, he

was paid the remaining $4,500 of the agreed purchase price and then arrested. At a post-arrest interview with Defendant Hill, Fridley admitted that he had the auto parts for sale, that he had removed the VIN tags, and that the titles he had for sale were "open." (Hill Affidavit, ¶20).

Fridley was charged with three counts of "knowingly offering to sell a manufacturer's identification plate which had been removed from the vehicle upon which it had been originally attached" in violation of 625 ILCS §5/4-103(a)(5), which makes such conduct a felony. He had an initial appearance on September 3, 1997, and bonded out the same day. On October 2, 1997, at a preliminary hearing, Judge Robert J. Eggers found probable cause to believe Fridley had violated Illinois law in the manner he was charged (Transcript, Exhibit F to Doc. #56, p. 22). In January, 1998, on motion of the State of Illinois, the charges were dismissed without prejudice. Fridley's property other than the VIN tags was released to him in April, 1998. In September, 1998, the Illinois court ordered the State to refile charges or return the VIN tags to Fridley, and Illinois chose the latter course.

Generally Applicable Principles of Law

42 U.S.C. §1983, R.S. §1979, was adopted as part of the Act of April 20, 1871, and reads, as amended:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

> party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The statute creates a cause of action sounding essentially in tort on behalf of any person deprived of a constitutional right by someone acting under color of state law. *Memphis Community School District v. Stachura*, 477 U.S. 299, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986); *Carey v. Piphus*, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978). The purpose of §1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails. *Wyatt v. Cole*, 504 U.S. 158, 1125 S. Ct. 1827, 118 L. Ed. 2d 504 (1992). In order to be granted relief, a plaintiff must establish that the defendant deprived him of a right secured by the U.S. Constitution and the laws of the United States and that the deprivation occurred under color of state law. *See West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988); *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981); *Flagg Brothers Inc. v. Brooks*, 436 U.S. 149, 155, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978).

Government officials, such as the Police Defendants, performing discretionary functions are afforded a qualified immunity under 42 U.S.C. §1983 as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have

known." *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982); *Christophel v. Kukulinsky*, 61 F. 3d 479, 484 (6th Cir. 1995); *Adams v. Metiva*, 31 F. 3d 375, 386 (6th Cir., 1994); *Flatford v. City of Monroe*, 17 F. 3d 162 (6th Cir. 1994). The question is not the subjective good or bad faith of the public official, but the "objective legal reasonableness" of his or her action in light of clearly established law at the time the official acted. *Anderson v. Creighton*, 483, U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). In order for the violated right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he or she is doing violates that right; in light of pre-existing law, the unlawfulness of the official's action must be apparent. *Anderson v. Creighton*, 483 U.S. at 640. The test is whether the law was clear in relation to the specific facts confronting the public official when he acted; the constitutional right must not be characterized too broadly without considering the specific facts of the case. *Guercio v. Brody*, 911 F. 2d 1179 (6th Cir. 1990). If officers of reasonable competence could disagree on an issue, immunity should be recognized. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986); *Mumford v. Zieba*, 4 F. 3d 439, 432 (6th Cir. 1993); *Gossman v. Allen*, 950 F. 2d 338, 341 (6th Cir. 1991). A probable cause determination, even if wrong, is not actionable as long as it was a reasonable determination. Reasonableness is a question of law for the trial judge. *Hunter v. Bryant*, 502 U.S. 224, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991). When a defendant moves for summary judgment based on qualified immunity, the plaintiff must (1) identify a clearly established right alleged to have been violated; and (2) establish that a reasonable officer in the defendant's position should have known that the conduct at issue was undertaken in

violation of that right. *Pray v. City of Sandusky*, 49 F. 3d 1154, 1158 (6th Cir. 1995).

"A court evaluating a claim of qualified immunity 'must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.'" *Wilson v. Layne*, 526 U.S. 603, 119 S. Ct. 1692, 143 L.Ed.2d 818 (1999), quoting *Conn v. Gabbert*, 526 U.S. 286 (1999). "Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public." *Wilson v. Layne*, 526 U.S. 603, 1 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999), citing *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998). See also *Siegert v. Galley*, 500 U.S. 226, 111 S. Ct. 789, 114 L. Ed. 2d 277 (1991); *Brennan v. Township of Northville*, 78 F. 3d 1152, 1154 (6th Cir. 1996); *Jarvis v. Wellman*, 52 F. 3d 125 (6th Cir. 1995); *Megenity v. Stenger*, 27 F. 3d 1120, 1124 (6th Cir. 1994); *Centanni v. Eight Unknown Officers*, 15 F. 3d 587 (6th Cir. 1994); *Silver v. Franklin Twp.*, 966 F. 2d 1031 (6th Cir. 1992).

When a qualified immunity defense is presented on motion for summary judgment, the court must determine the circumstances with which defendants were confronted and the information they possessed. To make this determination, the Court must consider all the undisputed evidence produced in discovery, read in the light most favorable to the plaintiff. *Poe v. Haydon*, 853 F. 2d 418, 425 (6th Cir. 1988), following *Green v. Carlson*, 826 F. 2d 647, 650-52 (7th Cir. 1987). Application of the doctrine of qualified immunity to a particular defendant is a question

of law. *Garvie v. Jackson*, 845 F. 2d 647, 649 (6th Cir. 1988). To overcome a defendant's motion for summary judgment based on qualified immunity, the plaintiff: [sic] (1) identify a clearly established right alleged to have been violated; and (2) establish that a reasonable officer in the defendant's position would have known that the conduct at issue was undertaken in violation of that right. *Mays v. City of Dayton*, 134 F. 3d 809 (6th Cir. 1998), citing *Pray v. Sandusky*, 49 F. 3d 1154, 1158 (6th Cir. 1995). If the court finds no valid claim pursuant to 42 U.S.C. §1983, the court need not reach the issue of qualified immunity. *Carlson v. Conklin*, 813 F. 2d 769 (6th Cir. 1987).

Application of Law to this Case

Federal Claims

Plaintiff makes the following claims under § 1983: (1) deprivation of liberty by arrest and confinement without probable cause in violation of the Fourth and Fourteenth Amendments; (2) Prosecution without probable cause, of the Fifth and Fourteenth Amendments; (3) denial of access to counsel in violation of the Sixth and Fourteenth Amendments; and (4) deprivation of property without due process, in violation of the Fifth and Fourteenth Amendments. These claims will be analyzed seriatim.

ARREST WITHOUT PROBABLE CAUSE

It is a felony in the State of Illinois to knowingly offer for sale VIN tags which have been removed from the vehicle to which they were originally attached. 625 ILCS §5/4-103(a)(5). Without question, Fridley did in fact offer removed VIN tags for sale in Illinois in the presence of at

least some of the Defendants, who then signaled the rest of the Defendants to assist in his arrest in a typical "buy-bust" police operation. All of the Police Defendants participated in Plaintiff's arrest; neither Plaintiff nor any of the Police Defendants seeks to differentiate their roles in making the arrest.

A warrantless arrest is lawful under the Fourth Amendment if supported by probable cause. *Beck v. Ohio*, 379 U.S. 89, 90, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964). The Constitution permits an officer to arrest a suspect without a warrant if there is probable cause to believe that the suspect has committed or is committing an offense. *Michigan v. DeFillippo*, 443 U.S. 31, 39, 99 S.Ct. 2627 (1979). While Plaintiff does not dispute that each of the Police Defendants had probable cause to believe he offered the removed VIN tags for sale in Illinois, Plaintiff contends they did not have probable cause to arrest him because they knew or should have known he was innocent of the crime by virtue of 720 ILCS §5/7-12 which provides:

> A person is not guilty of an offense if his or her conduct is incited or induced by a public officer or employee, or agent of either, for the purpose of obtaining evidence for the prosecution of that person. However, this Section is inapplicable if the person was predisposed to commit the offense and the public officer or employee, or agent of either, merely affords to that person the opportunity or facility for committing an offense.

Plaintiff also relies on the common law principles of entrapment and the Supreme Court's pronouncement on the issue in *Jacobson v. United States*, 503 U.S. 540, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992).

In arguing that the Police Defendants were obligated to consider this affirmative defense, Plaintiff relies on the Sixth Circuit decisions in *Estate of Dietrich v. Burrows*, 167 F. 3d 1007 (6th Cir. 1999), *Painter v. Robertson*, 185 F. 3d 557 (6th Cir. 1999); *Gardenshire v. Schubert*, 205 F. 3d 303 (6th Cir. 2000); and *Ahlers v. Schebli*, 188 F. 3d 365 (6th Cir. 1999). However, the arrest did not take place in the Sixth Circuit, but in the Seventh in [sic] where it is the law that in assessing probable cause, officers have no obligation to conduct any further investigation with respect to possibly exculpatory evidence. *Eversole v. Steele*, 59 F. 3d 710, 718 (1995), quoting *Garcia v. Chicago*, 24 F. 3d 966, 970 (7th Cir. 1994).

Even if the arrest were measured under Sixth Circuit law, Plaintiff has not established that the Police Defendants did not reasonably believe they had probable cause to make the arrest. The Illinois entrapment defense requires proof of the following elements: (1) the concept of committing the offense originated with the State or its agent; (2) who actively encourages the defendant to commit the offense; (3) for purposes of obtaining evidence for defendant's prosecution; and (4) that the defendant was not predisposed to commit the offense. *Humprey v. Staszak*, 148 F.3d 719, 725 (7th Cir. 1998) (citing *People v. Wielgos*, 142 Ill.2d 133, 154 Ill.Dec. 640, 568 N.E.2d 861, 863 (1991) (citing Ill.Rev.Stat.1985, ch. 38, par. 7-12)). The defense of entrapment is not available to a person who has intent and design to commit the offense, merely because the officer, for purposes of securing evidence, affords the person an opportunity to commit a criminal act, or purposely aids and encourages him in its perpetration. *People v. Wright*, 7 Ill.2d 557, 190 N.E.2d 318 (Ill. 1963).

There is no proof that the idea of selling VIN tags removed from vehicles was suggested to Fridley in the first instance by the Police Defendants or by Gluszek. While Fridley may not have known that such sales were criminal under Illinois law, there is no evidence that any of the Defendants misrepresented the Illinois law to him. His own ignorance of Illinois law does not excuse his behavior, nor does the Police Defendants ignorance of Ohio law, under which Fridley claims such sales are lawful[2], inculpate them. What the Police Defendants knew from Gluszek was that Fridley was willing to sell car parts in Illinois and, if paid a downpayment of $500, willing to come to Illinois to deliver the parts, including removed VIN tags. In *Painter* and *Dietrich, supra*, the arresting officers knew that the persons they arrested were entitled to be armed under the relevant Ohio statutes. The Police Defendants in this case did not "know" that they had entrapped Fridley.

Plaintiff strongly urges that Gluszek was not a reliable informant; Plaintiff's expert, Michael D'Amico, suggests numerous reasons why a careful police officer would not have relied on Gluszek. However, in this instance, reliance on a potentially unreliable source did not result in a violation of Plaintiff's rights – the officers did not obtain an invalid search warrant, for example.

Plaintiff claims that the Police Defendants cannot relitigate the entrapment defense because the Illinois

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[2] Fridley makes a passing claim that such sales are lawful under federal law and that federal law preempts Illinois law in this regard, but he does not develop the argument or offer any authority for the preemption proposition.

courts have already decided it against them (Reply Memorandum, Doc. #61, at 6-7), citing *Migra v. Warren City School District Board of Edn.*, 465 U.S. 75, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984), and *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411, 66 L. Ed. 2d 208 (1980). Those cases hold collateral estoppel applies when a § 1983 plaintiff attempts to relitigate in federal court issues decided against him in state criminal proceedings and certainly would operate to provide collateral estoppel effect in favor of a plaintiff as to whom an issue was finally decided in the state courts. But Plaintiff has inaccurately stated what happened in the Illinois courts. Fridley moved to dismiss on entrapment grounds, but that motion was never decided in his favor. The actual dismissal was without prejudice and made on motion of the State. A dismissal without prejudice carries no collateral estoppel effect.

In sum, when they arrested Fridley, the Police Defendants had probable cause to believe he had then and there committed a felony and their probable cause was not dispelled by any possible entrapment defense of Fridley's. Therefore, they did not violate his Fourth and Fourteenth Amendment rights to be free from arrest without probable cause. *A fortiori*, they are entitled to qualified immunity for the arrest.

DENIAL OF ACCESS TO COUNSEL

Plaintiff claims that the Police Defendants blocked his ability to call the 937 area code from the Sangamon County Jail and therefore his ability to contact an attorney between the time of his arrest and the time he made his first court appearance, in asserted violation of his Sixth and Fourteenth Amendment rights to counsel.

As the Police Defendants point out, the Sixth Amendment right to counsel does not attach until after an adversarial judicial proceeding is commenced against a person. *Slavin v. City of Oak Ridge*, 810 F. 2d 203 (6th Cir. 1986). In this case that did not happen until Fridley made his first appearance on September 3, 1997, and was formally charged; since he was thereupon released on bond, his access to counsel was not thereafter impeded.

More importantly, Plaintiff has offered no evidence to contradict the uncontroverted affidavits of each of the Police Defendants that they had no control over or influence on his access to telephones in the Sangamon Count [sic] Jail. Even if the right to counsel were held to attach at the moment of arrest, all of the Police Defendants have sworn they did nothing to interfere with that right and Plaintiff has offered no contrary evidence.

Plaintiff's Sixth Amendment claim is thus without merit.

MALICIOUS PROSECUTION

Plaintiff claims that the decision to prosecute him constituted malicious prosecution in violation of his Fifth and Fourteenth Amendments due process rights.

Plaintiff intends this claim to be considered separate from his false arrest claim. That is, he asserts it was malicious prosecution actionable under § 1983 to continue the prosecution after he was released on bond. That, however, is not the law. Prosecution without probable cause is actionable under 42 U.S.C. § 1983 only if accompanied by incarceration, loss of employment, or some other palpable consequence. *Albright v. Oliver*, 510 U.S. 266, 114

S. Ct. 807, 127 L. Ed. 2d 114 (1994). There is no showing Plaintiff was incarcerated (apart from the incarceration from arrest to initial appearance) or lost his employment or suffered any damages other than the temporary loss of property and the need to employ counsel to defend the criminal action.

More importantly, however, this claim is defeated by the finding of probable cause made by Judge Eggers. The Seventh Circuit has held that "the existence of probable cause for arrest is an absolute bar to a Section 1983 claim for unlawful arrest, false imprisonment, or malicious prosecution." *Biddle v. Martin*, 992 F.2d 673, 678 (7th Cir. 1993) (quoting *Schertz v. Waupaca County*, 875 F.2d 578, 582 (7th Cir. 1989)). The *Biddle* court upheld a grant of summary judgment against the defendant-arrestee without examining any other elements of a malicious prosecution claim because probable cause existed for the plaintiffs arrest. *Biddle*, 992 F.2d at 678. Here, probable cause was found by the Circuit Court and now precludes any claim of malicious prosecution.

DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS

Plaintiff claims that the Police Defendants deprived him of his property without due process of law, in violation of the Fourteenth Amendment, both by making the initial seizure and by detaining the property past the time when the criminal charges against him were dismissed.

To prevail on such a claim, Plaintiff must plead and prove absence of adequate state remedies as an element. *Vicory v. Walton*, 721 F.2d 1062 (6th Cir. 1983). The constitutional violation actionable under §1983 is not complete

when the deprivation occurs; it is not complete unless and until the State fails to provide due process. *Zinermon v. Burch*, 494 U. S. 113, 126, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990). Fridley has neither pleaded nor proven that the post-deprivation process which Illinois made available did not comport with due process requirements.

State Law Claims

Plaintiff Mark Fridley also makes supplemental[3] claims under Illinois law for false arrest/unlawful imprisonment and for malicious prosecution; his spouse, Denise, claims loss of consortium.

If the Court dismisses the federal claims, it could refuse to exercise supplemental jurisdiction under 28 U.S.C. §1367. However, a district court should consider the interests of judicial economy and the avoidance of multiplicity of litigation and balance those interests against needlessly deciding state law issues when deciding whether to retain supplemental jurisdiction. *Aschinger v. Columbus Showcase Co.*, 934 F. 2d 1402 (6th Cir. 1991). In this case the factual issues involved in the state law claims are closely intertwined with the federal issues and fully developed. There is thus no good reason to refuse to adjudicate those claims.

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[3] Plaintiff refers to these as "pendent" claims. The doctrine of pendent jurisdiction has been codified as "supplemental jurisdiction" at 28 U.S.C. §1367.

To prove false arrest or imprisonment under Illinois law, "a plaintiff must show that the restraint was unreasonable or without probable cause." *Martel Enter. v. City of Chicago*, 223 Ill.App.3d 1028, 164 Ill.Dec. 945, 949, 584 N.E.2d 157, 161 (11th Dist. 1991). Probable cause is an absolute bar to a claim for false imprisonment. Id. at 161, 164 Ill.Dec. at 949. To the extent that Fridley bases his false imprisonment claims on his arrest for the VIN tags, his claim is barred as this Court has found probable cause did exist for Fridley's arrest as did the Circuit Court of Sangamon County.

The claim for malicious prosecution under Illinois law has five elements that a plaintiff must plead and prove: "(1) he was subjected to judicial proceedings; (2) for which there was no probable cause; (3) the defendants instituted or continued the proceedings maliciously; (4) the proceedings were terminated in the plaintiff s favor; and (5) there was an injury." *Reed v. City of Chicago*, 77 F.3d 1049, 1051 (citing *Curtis v. Bembenek*, 48 F.3d 281, 286 (7th Cir. 1995) (citations omitted)). A plaintiff's failure to prove any one of the elements defeats a malicious-prosecution claim. *Swick v. Liautaud*, 169 Ill.2d 504, 512, 169 N.E.2d 1238, 1242 (1986). The finding of probable cause bars this claim as well.

Finally, since Denise Fridley's claim for loss of consortium is derivative of Mark Fridley's underlying claims, all of which are without merit, the claim for loss of consortium should also be dismissed.

CONCLUSION

In accordance with the foregoing Report, it is hereby recommended that Plaintiff Mark Fridley's Motion for

Partial Summary Judgment be DENIED, the Police Defendants' Motion for Summary Judgment be GRANTED, and

1. Plaintiffs' claims against Defendant Don Neal be dismissed without prejudice for want of prosecution;

2. Plaintiff's claims against Donald Gluszek be set for hearing to determine Plaintiff's damages; and

3. All other claims herein be dismissed with prejudice.

June 14, 2000.

/s/ Michael R. Merz
Michael R. Merz
United States Magistrate Judge

NOTICE

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to the proposed findings and recommendations within ten days after being served with this Report and Recommendations. Pursuant to Fed. R. Civ. P. 6(e), this period is automatically extended to thirteen days (excluding intervening Saturdays, Sundays, and legal holidays) because this Report is being served by mail and may be extended further by the Court on timely motion for an extension. Such objections shall specify the portions of the Report objected to and shall be accompanied by a memorandum of law in support of the objections. If the Report and Recommendations are based in whole or in part upon matters occurring of record at an oral hearing, the objecting party shall promptly arrange for the transcription of the record, or such portions of it as

all parties may agree upon or the Magistrate Judge deems sufficient, unless the assigned District Judge otherwise directs. A party may respond to another party's objections within ten days after being served with a copy thereof.

Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See, United States v. Walters*, 638 F. 2d 947 (6th Cir. 1981); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985).

00-4148

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MARK S. FRIDLEY, ET AL., Plaintiffs-Appellants,	)	
v.	)	ORDER
WALTER HORRIGHS, INVESTIGATOR SPECIAL SERVICE INVESTIGATION OFFICE OF SECRETARY OF STATE DEPARTMENT OF POLICE DISTRICT THREE, ET AL., Defendants-Appellees.	)	(Filed Aug. 30, 2002)

BEFORE: RYAN and GILMAN, Circuit Judges; and POLSTER,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

* Hon. Dan A. Polster, United States District Judge for the Northern District of Ohio, sitting by designation.

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk lm